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No. 80-763

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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SUPREME COURT, U.S.

W.J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Petitioner,

-against-

JERRY LANE JUREK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in applying the settled law concerning the voluntariness of confessions to the specific facts of this case?

2. Whether the admission into evidence against respondent of an involuntary confession constituted harmless error beyond a reasonable doubt?

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Jerry Lane Jurek respectfully requests that the Court deny the petition for a writ of certiorari filed on November 10, 1980 by petitioner W. J. Estelle, Jr., seeking review of the Fifth Circuit's opinion en banc in this case.

STATEMENT OF THE CASE

The facts are adequately set forth in the opinion of Judge Garza for the Court of Appeals, A. 5-13, [1/] as supplemented by the opinion of Judge Frank Johnson, Jr., A. 28-48.

1/ Each reference to the August 11, 1980 opinion of the United States Court of Appeals for the Fifth Circuit, reported at 623 F.2d 923 (5th Cir. 1980)(en banc), which is Appendix A to petitioner's petition for writ of certiorari, will be indicated by the abbreviation "A."

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS EMPLOYED THIS COURT'S WELL-ESTABLISHED STANDARDS IN ASSESSING THE VOLUNTARINESS OF RESPONDENT'S CONFESSIONS

In his petition for certiorari, petitioner alleges that the Court of Appeals somehow announced a new and improper standard for appellate review of the voluntariness of a confession, "a standard of independent review notwithstanding the prior findings" of the federal district court. (Petition, at 7).[2/]

Petitioner's allegation is unfounded. Judge Garza for the Court of Appeals took pains to address the standard-of-review issue and held: "We will not disregard or overturn specific findings of fact made by the district court unless they are clearly erroneous" (A. 4). Instead, relying upon a wealth of precedent from this Court, the Court of Appeals simply undertook its "affirmative duty to 'examine the entire record and make an independent determination of the ultimate issue of voluntariness.' Beckwith v. United States, 425 U.S. 341, 348, 96 S.Ct. 1612, 1617, 48 L.Ed.2d 1 (1976). See also Davis v. North Carolina, 384 U.S. 737, 741-42, 86 S.Ct. 1761, 1764, 16 L.Ed.2d 895 (1966); Haynes v. Washington, 373 U.S. 503, 515-16, 83 S.Ct. 1336, 1344, 10 L.Ed.2d 513 (1963); Spano v. New York, 360 U.S. 315, 316, 79 S.Ct. 1202, 1203, 3 L.Ed.2d 1265 (1959); Ashcraft

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2/ Each reference to the petition for writ of certiorari, filed November 10, 1980 by petitioner W. J. Estelle, Jr., will be indicated by the word "Petition."

v. Tennessee, 322 U.S. 143, 147-48, 64 S.Ct. 921, 923, 88 L. Ed. 1192 (1944); Lisenba v. California, 314 U.S. 219, 237, 62 S.Ct. 280, 290, 86 L.Ed. 166 (1941)" (A. 4-5).

In judging the ultimate legal issue of voluntariness, Judge Garza properly noted that, "where the district court made no findings on matters crucial to the ultimate determination," the Court of Appeals was free to "reach into the record and rely on undisputed facts clearly supported therein" (A. 4-5). (See also the opinion of Judge Johnson, at A. 36 n.10).

Petitioner's implications to the contrary not withstanding, the minority of the Court of Appeals did not disagree with Judge Garza's approach. Instead they acknowledged that "[a] mechanical use of the 'clearly erroneous' standard" in reviewing the ultimate legal issue of voluntariness "may be inconsistent with Supreme Court precedent," (A. 62) and that "[t]he Supreme Court has iterated and reiterated its 'independent review' test on numerous occasions" (A. 65). Moreover, the minority confessed that the "clearly erroneous" standard of review previously employed by the Fifth Circuit to assess voluntariness "may not be that much different from the 'independent review' standard set forth by the Supreme Court" (A. 69). Indeed, although the minority chose formally not to "take a firm stand concerning the proper standard of review," (A. 58), they in fact "appl[ied the independent review] standard in [their] analysis" of the confessions at issue in this case. (A. 71) In sum, no real disagreement exists on the proper standard of review.

Petitioner has also suggested that certiorari should be granted to remedy the Court of Appeals' ostensible failure to address "the application of 28 U.S.C. §2254(d)" to this case, citing Procunier v. Atchley, 400 U.S. 446 (1971) for the proposition that a "threshold determination" should have been made as to "whether [Jurek] would be entitled to relief if his allegations were to be believed," especially in view of the fact that "Jurek has never taken the stand or asserted personally that his confession was in any way involuntary" (Petition, at 8).

At no point in his brief to the lower court panel, in his suggestion for rehearing, or in his brief en banc did petitioner ever previously raise this objection. For that reason alone, it should not be addressed as an initial matter in this Court. California v. Taylor, 353 U.S. 553, 557 n.2 (1957); accord, United States v. Ortiz, 422 U.S. 891, 898 (1975); Ramsey v. United Mine Workers, 401 U.S. 302, 312 (1971); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970).

Moreover, even were it legally cognizable, petitioner's argument lacks factual underpinnings in this case. The involuntariness claim was pleaded in clear and timely fashion; respondent Jurek alleged in his Amended Petition for Writ of Habeas Corpus, filed on April 11, 1977 in the United States District Court for the Southern District of Texas, that his

> "conviction and sentence of death deprive him of rights guaranteed

> by the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, because he was convicted and sentenced to die following a trial in which the only noncircumstantial evidence presented by the prosecution attorney consisted of two written confessions obtained from him in violation of his rights." (Amended Petition, ¶12(f)(i))

The amended petition alleged particular facts in support of this claim: that Jurek's arrest had been unlawful; that he had been taken from his home without a shirt or shoes; that the police, including the victim's father, had questioned him repeatedly after giving him Miranda warnings which he did not understand. The petition also recounted the extended travel Jurek was forced to undergo during his interrogation, the twenty-one hours of delay in bringing him before a magistrat and the second interrogation initiated after his first confession proved unsatisfactory to State prosecutors, all at a time when he had not see either family or counsel. (Amended Petition, ¶12(f)(ii-viii)

These allegations, if believed, indisputably suffice to state a federal constitutional claim that the "totality of circumstances" surrounding Jurek's arrest and interrogation rendered his statements involuntary. The Court of Appeals, relying upon the District Court's factual findings and upon undisputed record facts, concluded that Jurek's constitutional claim was factually supported and that his second written statement was therefore involuntary.[3/] The Court of Appeals thus

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3/ In Procunier v. Atchley, the lower federal courts had reversed a state conviction solely because the state court had

[cont'd.]

necessarily passed well beyond any "threshold determination" required by 28 U.S.C. §2254(d).

II.

THE COURT OF APPEALS CORRECTLY DETERMINED THAT RESPONDENT'S SECOND CONFESSION WAS INVOLUNTARY AND INADMISSIBLE

The heart of petitioner's certiorari petition is his request for this Court to review the facts of this case. Yet twenty-six judges of the Fifth Circuit 4/ have previously undertaken that task, and as Judge Brown acknowledged for the minority, the Court of Appeals' "factual discussion is rather detailed [because] this case depends so heavily on the precise facts" (A. 72). Since no real issue exists concerning the proper standard to be applied, a grant of certiorari merely to review the voluminous record in this case would be unwarranted.

3/ cont'd.

employed inadequate fact-finding procedures in determining the issue of voluntariness, even though the federal courts were themselves "not 'presently able to say that the confession was involuntary,'" Procunier v. Atchley, supra, 400 U.S. at 450. By contrast, the Court of Appeals here did not rest its decision on the inadequacy of state procedures, but upon its conclusion, based upon facts in the record, that Jurek had demonstrated involuntariness.

Finally, it is obvious that there exist no constitutional or statutory requirements that a defendant -- in this case a youth with a verbal I.Q. of 66 -- must himself take the stand in order to assert a claim of involuntariness.

4/ The en banc panel comprised twenty-four judges. Judge Gewin and Judge Goldberg, each of whom sat on the initial panel and declared Jurek's confessions to be involuntary, were on senior status and did not participate in the en banc decision in this case.

See, e.g., United States v. Johnston, 268 U.S. 220, 227 (1925).[5/]

Petitioner has attempted to remedy this deficiency by creating a new legal issue. He alleges without citation, that Judge Garza "indicated that the second confession was involuntary since Jurek did not have an attorney" and that Judge Garza's "opinion indicates that an attorney should be appointed in spite of a defendant's assertion that he does not want an attorney" (A. 9).

Petitioner's assertion is inexplicable. The Court of Appeals did not decide this case on right-to-counsel grounds, and Judge Garza went so far as to hold that "the district court's findings [on Jurek's purported request for counsel] were correct, and that they negate any conclusion that Miranda was violated, and demonstrate the minimal effect of the lack of immediate assistance [of counsel] on the voluntariness issue" (A. 19).

5/ Review of a factual issue, moreover, is inappropriate as a practical matter, since even were a reversal on this issue obtained, the case would be far from resolved. The en banc court reserved decision on a Witherspoon v. Illinois claim (A. 3, 26 n.8; 58 n.1) and the original panel has not yet addressed three other constitutional claims not presented to the Court of Appeals en banc (A. 27).

III.

THE ADMISSION INTO EVIDENCE OF RESPONDENT'S SECOND CONFESSION WAS NOT "HARMLESS ERROR" IN THIS CAPITAL CASE

Petitioner's final reason for requesting certiorari is his assertion that the use of Jurek's second written confession against him at his trial was "harmless error" (Petition, at 10).

Petitioner's contention flouts settled law that "[c]onvictions following the admission into evidence of confessions which are involuntary . . . cannot stand," Rodgers v. Richmond, 365 U.S. 534, 540 (1961), "even though the evidence apart from that confession might have been sufficient to sustain the jury's verdict" Stroble v. California, 343 U.S. 181, 190 (1952); accord, Mincey v. Arizona, 437 U.S. 385, 398 (1978); Haynes v. Washington, 373 U.S. 503, 518-19 (1963); Payne v. Arkansas, 356 U.S. 560 (1958). Indeed, in Chapman v. California, 386 U.S. 18, 23 n.8 (1967), this Court identified the use of coerced confessions as an error which could never prove harmless.

Even were confessions subject to the harmless error rule of Chapman, it would be inconceivable to find "beyond a reasonable doubt" that the admission of Jurek's second written statement "did not contribute to the verdict obtained." While in his first statement, Jurek's purported motive for the victim's death was anger over her criticism of his family (A. 10, 91-92), in the second statement, Jurek ostensibly changed his statement to allege "that he had strangled the child after she refused to have sexual relations with him" (A. 13; A. 92-93).

Since under Texas Penal Code Art. 1257(b)(2), one of the narrow factors permitting a death sentence to be imposed was the commission of murder "in the course of committing or attempting to commit . . . forcible rape," Jurek's second confession, which constituted the only direct evidence that he had sexually assaulted the victim, undoubtedly "contribut[ed] to the verdict obtained" on this crucial issue.

CONCLUSION

Respondent prays that the petition for a writ of certiorari be denied.

Dated: December 15, 1980.

Respectfully submitted,

s/ Jay Topkis

JAY TOPKIS
345 Park Avenue
New York, New York 10022

ATTORNEY OF RECORD

JOHN CHARLES BOGER
10 Columbus Circle
New York, New York 10019

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)
Petitioner,
)
-against-
)
JERRY LANE JUREK,
)
Respondent.
)

I, Jerry Lane Jurek, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the respondent in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. Counsel is serving on my behalf without remuneration. At trial and on appeal, lawyers were appointed to represent me because I was indigent.

5. I believe that I am entitled to redress.

6. The nature of said cause is briefly stated as follows:

I was convicted in DeWitt County District Court, a trial court of the State of Texas, of capital murder and was sentenced to death. I am being held at the Ellis Unit of the Texas Department of Corrections in Huntsville, Texas. I believe that errors were committed during the course of my trial in violation of my constitutional rights and that my conviction and death sentence were imposed upon me in violation of my constitutional rights.

Jerry L. Jurek

JERRY LANE JUREK

STATE OF TEXAS

COUNTY OF

The foregoing affidavit of Jerry Lane Jurek was subscribed and sworn to before me this 22 day of

Mel. Broesche

NOTARY PUBLIC

DELWIN O. BROESCHE
NOTARY PUBLIC WALKER CO. TEXAS
MY COMMISSION EXPIRES 6 30 84

My commission expires:

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-against-

JERRY LANE JUREK,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The respondent, Jerry Lane Jurek, by his undersigned counsel, asks leave to file the attached Brief in Opposition without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Counsel has not yet received an affidavit from respondent, who is presently incarcerated at the Ellis Unit of the Texas Department of Corrections in Huntsville, Texas. Mr. Jurek's affidavit in support of this motion will be forwarded to the Court immediately upon receipt.

JOHN CHARLES BOGER
10 Columbus Circle
New York, New York 10019

ATTORNEY FOR RESPONDENT

No. 80-763

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

W.J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS,

Petitioner,

-against-

JERRY LANE JUREK,

Respondent.

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JOHN CHARLES BOGER, being duly sworn, states:

1. I am counsel to Jerry Lane Jurek in Estelle v. Jurek, now pending in this Court on petition for writ of certiorari, and I make this affidavit in support of Mr. Jurek's motion for leave to proceed in forma pauperis. My representation of Mr. Jurek is without remuneration.

2. Mr. Jurek is presently in the custody of the State of Texas and is not immediately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Jurek by me and will be forwarded to the Court immediately upon receipt. A copy of the affidavit to be signed by Mr. Jurek is attached hereto.

3. Counsel was appointed to represent Mr. Jurek at his trial and on appeal. Volunteer counsel has represented Mr. Jurek in all subsequent proceedings. Mr. Jurek was permitted to proceed in forma pauperis on appeal to the court below pursuant to Rule 24 of the Federal Rules of Appellate Procedure.

4. I am informed and believe that because of his poverty, Mr. Jurek is unable to pay the costs of this cause or to give security for same.

5. I believe that Mr. Jurek is entitled to redress in this cause.

JOHN CHARLES BOGER

Sworn to before me this
15th day of December, 1980

NOTARY PUBLIC

My commission expires:

JOEL BERGER
Notary Public, State of New York
No. 31-0281197
Qualified in New York County
Commission Expires March 30, 1982

No. 80-763

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_____

JERRY LANE JUREK

STATE OF TEXAS

COUNTY OF

The foregoing affidavit of Jerry Lane Jurek was subscribed and sworn to before me this ___ day of

_____

NOTARY PUBLIC

My commission expires: